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Marilyn Burgess - District Clerk Harris County
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2024-03265 / Court: 125

CAUSE NO. _____

HARVEY EUGENE MURPHY JR.	§	**IN THE DISTRICT COURT**
	§	
v.	§	
	§	
ESSILORLUXOTTICA USA INC., LUXOTTICA OF AMERICA'S INC., LUXOTTICA RETAIL NORTH AMERICA INC., MACY'S, INC. KIMCO REALTY CORPORATION, THOMAS STITES, GREYSI NAYELI RODRIGUEZ BONILLA, AND ANTHONY PFLEGER	§	**OF HARRIS COUNTY, TEXAS**
	§	
	§	
	§	
	§	
	§	
	§	**_____JUDICIAL DISTRICT**

PLAINTIFF'S ORIGINAL PETITION

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On January 22, 2022, the Sunglass Hut on West Gray in Houston, Texas was robbed by a violent criminal who threatened the employees with a gun and stole thousands of dollars. At the exact time of the robbery, Harvey Eugene Murphy Jr. (a 61-year-old grandfather who goes by Murphy) was in Sacramento California, 2,000 miles from Houston. Murphy grew up in Texas, but never visited the Sunglass Hut and knew nothing about the billion-dollar Fortune 500 company that owns the thousands of Sunglass Hut around the world. Murphy had no idea this company would use its vast resources to pay for error-ridden facial-recognition software that would positively (but falsely) identify him as a violent criminal who robbed not only the Sunglass Hut, but also Macy's.

As a result of being falsely identified as a violent criminal who committed numerous robberies, a warrant was issued for his arrest. When Murphy went to get his driver's license renewed, he was arrested and put into an overcrowded maximum-security jail with violent criminals. While in jail trying to prove his innocence, he was beaten, gang-raped, and left with permanent and awful life-long injuries.

Hours after being beaten and gang-raped, the charges against him were dropped and he was released.

Murphy's story is tragic. But worse than that, it is scary for everyone in this country. Any one of us could be improperly charged with a crime and jailed based solely on error-prone facial recognition software. The companies that use this kind of software know it has a high rate of false positives, but they still use it to positively identify alleged criminals. Imagine going to the DMV to get your license renewed and being told you are under arrest for multiple felonies. Even though you are completely innocent, you will automatically be jailed until you can prove your innocence. During this time, you will be subjected to the known dangers of jail cells overcrowded with violent and dangerous criminals. All of this because a company told the police, based on artificial intelligence, that you were the one who committed terrible crimes.

I. PARTIES

Plaintiff Harvey Eugene Murphy Jr. ("Murphy") is a resident of Texas.

Defendant EssilorLuxottica USA, Inc., is a foreign corporation that does business in Texas. This company may be served with process through its registered agent, National Registered Agents Inc., 1999 Bryan Street, Suite 900, Dallas, TX 75201. ***Citation is requested at this time.***

Defendant Luxottica of America's Inc. is a foreign corporation that does business in Texas. This company may be served with process through its registered agent, National Registered Agents Inc., 1999 Bryan Street, Suite 900, Dallas, TX 75201. ***Citation is requested at this time.***

Defendant Luxottica Retail North America Inc. is a foreign corporation that does business in Texas. This company may be served with process through its registered agent, National Registered Agents Inc., 1999 Bryan Street, Suite 900, Dallas, TX 75201. ***Citation is requested at this time.***

Defendant Macy's Inc. ("Macy's") is a foreign corporation that does business in Texas. This company may be served with process through its registered agent, Tracy M. Preston, Chief

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Legal Officer / Litigation Department, 151 West 34th Street, New York, NY 10001. ***Citation is requested at this time.***

Defendant Kimco Realty Corporation ("Kimco") is a foreign corporation that does business in Texas. This company may be served with process through its registered agent, Registered Agent CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, TX 75201. ***Citation is requested at this time.***

Defendant Thomas Stites **("Stites")** is an individual residing in Harris County, Texas and may be served at 10110 Elm Knoll Trail, Houston, TX 77064, or wherever he can be located. ***Citation is requested at this time.***

Defendant Greysi Nayeli Rodriguez Bonilla ("Bonilla") is an individual residing in Harris County, Texas and may be served at 9343 Eagle Creek Lane, Houston, TX 77036, or wherever she can be located. ***Citation is requested at this time.***

Defendant Anthony Pfleger ("Pfleger") is an individual residing in Flagler County, Florida and may be served at 68 Fallen Oak Ln, Palm Coast FL, 32137, or wherever he can be located. ***Citation is requested at this time.***

II. DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under Level 3 as per Rule 190.4 of the Texas Rules of Civil Procedure.

III. JURISDICTION AND VENUE

2. Venue is proper pursuant to Section 15.002(a)(1) of the Texas Civil Practice and Remedies Code because the majority of the events that form the basis of this lawsuit occurred in Harris County, Texas. Furthermore, subject matter jurisdiction is present because there is not complete diversity of the parties.

3. Plaintiff is seeking at least $10,000,000.00 from the jury.

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IV. FACTS

4. The information contained in this Petition is based on the police records, the charging documents, court records, witness interviews, and upon information and belief.

5. On January 22, 2022, two armed men stormed into the Sunglass Hut on West Gray. One of the men put a gun in the face of the manager, Stites, and the sales associate, Bonilla. He threatened Stites and Bonilla and demanded all of the money in the store, while the other criminal grabbed as many sunglasses as he could carry. When the armed intruder got the money, he forced Stites and Bonilla into the back storeroom and demanded they stay in the room until the armed robbers could escape. Both Stites and Bonilla were afraid for their lives.

6. The Houston Police Department ("HPD") was called to the scene and immediately began investigating this armed robbery. HPD questioned Stites and Bonilla, as well as people who were around the Sunglass Hut at the time of the robbery. HPD reviewed the security footage from inside and outside the Sunglass Hut and found video of the getaway vehicle. HPD tracked down the owner of the license plate affixed to the getaway vehicle. HPD's investigation confirmed that the license plates were stolen ten days before the Sunglass Hut robbery.

7. As HPD was investigating this crime, HPD received a call from Anthony Pfleger, the head of loss prevention for EssilorLuxottica—the parent company of Sunglass Hut. Pfleger told HPD they could stop their investigation because he found their guy. He stated that he worked in conjunction with Macy's loss prevention to determine that the person who violently robbed the Sunglass Hut was Harvey Eugene Murphy Jr. ("Murphy"). Using artificial intelligence and facial recognition software, EssilorLuxottica and Macy's took the video from the robbery and determined that Murphy was the robber. The video was recorded by Kimco's poor low-quality cameras.

8. In addition to erroneously claiming that Murphy was the person who robbed the Sunglass Hut on January 22, 2022, Pfleger also incorrectly reported to HPD that EssilorLuxottica

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and Macy's determined that Murphy was the exact same person who robbed the Sunglass Hut on a previous occasion and also robbed a Macy's location in Houston.

9. Based on EssilorLuxottica's and Macy's positive (albeit false) representations that Murphy was a violent criminal and robbed the Sunglass Hut and Macy's, HPD turned its focus to Murphy. HPD visited the Sunglass Hut and asked to conduct a photo lineup with both Stites and Bonilla. EssilorLuxottica only allowed HPD to present the photo lineup to Bonilla and refused to make Stites available. Unbeknownst to the HPD, EssilorLuxottica had already prepped Bonilla and she was primed to identify Murphy as the robber. Not surprisingly, Bonilla positively identified Murphy as the armed robber who threatened her life.

10. Based on EssilorLuxottica's and Macy's representations and the photo lineup, HPD issued an arrest warrant for Murphy, falsely identifying him as a violent criminal who robbed multiple Sunglass Hut and Macy's stores.

11. After living in California for several years, Murphy moved back to Texas for work. He had no knowledge that EssilorLuxottica and Macy's falsely identified him as an armed robber or that a warrant was issued for his arrest. He was simply living and working in Gonzales, Texas when his driver's license expired. He visited the DMV and instead of leaving with his driver's license, he left in handcuffs. Murphy was taken into police custody, had his possessions confiscated, had his mug shot taken, was fingerprinted, and put into a jail cell. Obviously, Murphy was confused because—as he repeatedly told HPD— he had not done anything wrong for many years.

12. Murphy is the first one to admit that he was not a choirboy in his younger years. In his twenties, Murphy committed non-violent burglaries and spent time in and out of jail. While these crimes were not in any way violent, it is not something Murphy is proud of. But Murphy was able to turn his life around and by the early 1990's his criminal actions were behind him. Murphy

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began working full time and going to church. He worked in the prison ministry, helping people to change their lives the way he did.

13. So, when Murphy was arrested at the DMV, he had no idea what was going on. All he knew was he was being transported to the Harris County Jail because of a felony arrest warrant. When he was transferred to Harris County, he was arraigned, and the District Attorney's office—based on EssilorLuxottica's and Macy's representations that he committed several armed robberies— asked the Judge to keep him incarcerated with no bond. At his arraignment hearing, Murphy finally learned that he was being charged with the January 22, 2022, robbery.

14. Murphy knew that he did not commit this robbery, but when he learned the date of the robbery (January 22, 2022), he knew he had a rock-solid alibi, he was 2,000 miles away. His court-appointed defense lawyer confirmed his alibi. Once she confirmed that it was impossible for Murphy to have robbed the Sunglass Hut, she went to the prosecutor who also confirmed Murphy's alibi. Once the Assistant District Attorney learned that Murphy was not the robber, he agreed to dismiss the charges and release Murphy from jail.

15. A few hours before Murphy was to be released from jail, he was followed into the bathroom by three violent criminals. He was beaten, forced on the ground, and brutally gang raped. After this violent attack, one of the criminals held a shank against his neck and told him that if he reported the rape to anyone, he would be murdered. Murphy crawled to his bunk and faced the wall praying these men would not attack him again.

16. Murphy was released a few hours later, but in some ways, he never left jail. His time in jail will stay with him forever. Not an hour goes by without Murphy reliving the brutal attack and rape. Worse than that, the attack left him with permanent injuries that he has to live with every day of his life. All of this happened to Murphy because the Defendants relied on facial recognition technology that is known to be error prone and faulty.

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A. Dangers of Facial-Recognition Technology

17. Facial-recognition is a technology based on artificial intelligence that does an analysis on human faces by measuring human facial features and using these measurements to create a so-called "biometric template".

18. EssilorLuxottica is no stranger to facial recognition software. In fact, EssilorLuxottica's Sunglass Huts collect customers' "biometric identifiers" and "biometric information" with its face scanning apps at many of its locations and kiosks.[1] The "biometric identifiers" collected by EssilorLuxottica include "retina or iris scans, fingerprints, voiceprints, or scans of the hand or face geometry" and the "biometric information" collected includes "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual."[2] And what does EssilorLuxottica do with your personal information that it collects? "We may share the personal information that we collect about you."[3]

19. EssilorLuxottica not only profits from its facial-recognition software, but it uses facial-recognition software to identify people who allegedly steal from the Sunglass Hut. What companies like EssilorLuxottica and Macy's tell the public is that facial-recognition systems can have near-perfect accuracy. What they do not tell the public is that the "near-perfect accuracy" only occurs in absolutely ideal conditions. For example, facial recognition can match passport photographs to mug shots with accuracy scores as high as 99.97%.[4] However, this degree of accuracy is only possible in ideal conditions with consistent lighting and positioning and nothing

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[1] https://www.sunglasshut.com/us/sunglasses/privacy-policy

[2] *Id.*

[3] *Id.*

[4] George W. Source: Quinn, Patrick Grother, and James Matey, "IREX IX Part One Performance of Iris Recognition Algorithms," NISTIR 8207, April 2018, https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8207.pdf

obscuring the facial features.

20. In the real world, accuracy rates are much lower. The National Institute of Standards and Technology (NIST) conducted a series of large-scale independent evaluations for face recognition systems in 2000, 2002, 2006, 2010, 2013 and 2017 called the Face Recognition Vendor Test (FRVT). The FRVT found that the error rate of 9.3% for individuals captured "in the wild," where the subject may not be looking directly at the camera or may be obscured by objects or shadows.[5]

21. The FRVT found that this error rate increased by almost a factor of 10 when attempting to match a subject's face to photographs taken more than 18 years before. So, when EssilorLuxottica and Macy's compared unclear security footage to Murphy's mugshots from the 1980's, these companies knew that there was an error rate of almost 90%. Yet these companies told HPD with absolute certainty that they identified the person who robbed the Sunglass Hut.

V. CAUSES OF ACTION

Malicious Prosecution

22. A criminal prosecution was commenced against Murphy due to the actions of Defendants, EssilorLuxottica, Macy's, Kimco, Stites, Bonilla, and Pfleger. These Defendants initiated and procured the prosecution of Murphy. Because Murphy was completely innocent, the prosecution of Murphy was terminated and dismissed. When these Defendants initiated the prosecution against Murphy, the Defendants did not have the facts or circumstances that would create a belief in a reasonable person, acting on the facts in their knowledge, that Murphy was guilty of a crime. These Defendants acted with such gross indifference and reckless disregard for the rights of Murphy, and their actions amount to willful and wanton acts. Due to the actions of Defendants,

[5] NEC-002 FNMR at N=1.6M, R=1 on FRVT 2018 mugshots, and N=1.1M and R=1 on wild photos. Grother et al. "FRVT Part 2: Identification," March 27, 2020, https://pages.nist.gov/frvt/reports/1N/frvt_1N_report.pdf.

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Murphy suffered permanent and terrible harm.

False Imprisonment

23. Due to the actions of EssilorLuxottica, Macy's, Kimco, Stites, Bonilla, and Pfleger, Murphy was wrongfully detained in jail. This detention was without Murphy's consent and Defendants did not have legal authority or justification to have Murphy detained.

Negligence

24. EssilorLuxottica, Macy's, and Pfleger had a duty to act reasonably. These Defendants failed to act as reasonable companies and individuals when they caused Murphy to be arrested for a crime he did not commit. These Defendants knew, or should have known, that Murphy was innocent of the crime, and the face recognition software had a high rate of error. These Defendants breached their duty to act reasonably by informing the police that Murphy was a dangerous criminal even though he was innocent. These Defendants also breached their duty to act reasonably then they relied on bad camera footage, error prone facial recognition software, and old photographs of Murphy.

25. Bonilla and Stites owed a duty to act reasonably and inform the police that Murphy was not the person that robbed the Sunglass Hut. They also owed a duty to inform police that they had spoken to EssilorLuxottica's loss prevention before Bonilla participated in the photo lineup. These Defendants knew, or should have known, that Murphy was innocent of the crime, and the facial recognition software had a high rate of error. These Defendants breached their duty to act reasonably by informing the police that Murphy was a dangerous criminal even though he was innocent. These Defendants also breached their duty to act reasonably then they relied on loss prevention, bad camera footage, error prone facial recognition software, and old photographs of Murphy.

26. Kimco owed a duty to equip the premises with proper cameras. Kimco breached this duty by providing cameras with low quality and this breach contributed to Murphy's injuries.

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Gross Negligence

27. The conduct of the Defendants as set forth above was in reckless disregard of the rights, safety and welfare of their own invitees and others. Their conduct was based on a conscious disregard, which resulted in Murphy's tragic injuries. Such heedless and reckless disregard is more than momentary thoughtlessness, inadvertence, or misjudgment. Such unconscionable conduct goes beyond ordinary negligence and also constitutes gross negligence, making the Defendants liable not only for the actual damages caused to Murphy, but also for punitive and exemplary damages. The Defendants gross negligence proximately caused the injuries of Murphy.

VI. DAMAGES

28. Defendants' actions and inactions were the proximate cause of the physical pain and extreme mental anguish sustained by Murphy. This pain and anguish will not leave him in this lifetime. Further, Murphy continues to suffer permanent injuries and impairment, and will suffer for the rest of his life.

29. Defendants' negligence and breaches of duty proximately caused the injuries to Murphy which resulted in the following damages for which Murphy is entitled to reasonable and proper compensation:

a. past and future medical expenses;

b. past and future physical pain and mental anguish; and

c. past lost wages and future lost wage-earning capacity.

30. Murphy seeks punitive, exemplary, and unliquidated damages within the jurisdictional limits of this Court.

31. Murphy seeks all damages he is entitled to recover under the law, whether pleaded or not.

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VII. JURY DEMAND

32. Plaintiff hereby requests that a jury decide all factual issues in this case. The jury fee will be paid concurrently with the filing of this pleading.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Murphy prays the Defendants be cited to appear and answer herein; that upon final trial hereof they have judgment against the Defendants; that he recover his costs of Court expended herein; that he recover interest to which he is entitled by law, both pre-judgment and post-judgment; and for such other and further relief, both general and special, in law and in equity, to which he may show himself justly entitled.

Respectfully submitted,

RUSTY HARDIN & ASSOCIATES LLP

By: */s/ Daniel Dutko*

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